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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 776

HARRY Y. VICTOR AND ELLA S. VICTOR, HIS WIFE, EDWARD V. TRAINOR, JOHN C. KRUEGER, EMILIE B. KRUEGER AND JOSEPH RECUPIDO,

Petitioners,

vs.

HERBERT HILLEBRECHT, JAMES V. BREMNER AND WALTER A. WADE, AS TRUST MANAGERS, AND HERBERT HILLEBRECHT, INDIVIDUALLY, AND THE TRUST COMPANY OF CHICAGO, NOT INDIVIDUALLY BUT AS LIQUIDATION TRUSTEE UNDER TRUST NO. 995,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANK H. TOWNER,
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INDEX.

PAGE

There is No Federal Question Involved in This Case. The Issues Were Issues of Fact and of General Equity Jurisprudence 1, 9

No Federal Question Was Ever Raised by Petitioners in the Illinois Courts 3

Statement of the Case 5

The Trust Managers Violated No Rule of Law or Equity in Purchasing Certificates of Beneficial Interest 10-13

The Trustee Is Always Free to Buy From His Beneficiary Provided He Deals Fairly 11

Since the Trustee of a Trust With a Few Named Beneficiaries May Buy His Beneficiary's Interest, Then Certainly the Trustee of a Liquidation Trust With 14,439 Units of Beneficial Interest Outstanding Among 700 Different Holders is Free to Buy Certificates of Beneficial Interest 11

If There be Any Impropriety or Basis of Complaint in Any Purchase of a Certificate of Beneficial Interest by a Trustee, the Seller is the Only One Who Can Complain 12

Discussion 12-13

Conclusion 14

Opinion of the Supreme Court of Illinois 15-23

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

There is No Federal Question Involved in This Case.

The rights, powers, duties, and obligations of a trustee of an express trust are matters of general equity jurisprudence. In that field there is no special body of Federal law as opposed to State law. Federal Court opinions in that field frequently cite and rely upon State Court opinions, and State Court opinions frequently cite and rely upon the decisions of this Court and other Federal Courts.

The question involved in this case and decided by the Supreme Court of Illinois was in that field of general equity jurisprudence—the question of whether or not the Trust Managers by purchasing beneficial units in the open market had violated any fiduciary duty they owed to the petitioners.

The case had nothing to do with the Federal Bankruptcy Law nor with any other Federal statute; neither did the case as decided by the Supreme Court of Illinois involve any question as to the meaning or intent of any act done by the Federal Court in the bankruptcy proceeding which gave rise to the trust agreement here involved. The Court examined the trust agreement under which the Trust Managers were operating, together with the evidence with reference to their conduct, and determined that under well-established principles of general equity there was no proof that the Trust Managers had acted improperly or abused the discretion vested in them by the trust agreement.

77B reorganizations have resulted in almost every conceivable kind of capital structure. Sometimes the bankrupt corporation has been permitted to continue to own its property subject to a revised or deferred debt structure. Sometimes a new corporation has been organized to acquire the bankrupt's assets and the creditors have received stock in place of their evidences of indebtedness, and sometimes, as here, the property has been conveyed to a trustee under a trust agreement and the creditors have received certificates of beneficial units under the trust.

When the 77B reorganization is completed and the bankruptcy proceedings are concluded, the reorganized bankrupt or the resulting new corporation or the resulting trust goes its way. It no longer looks to Federal Law or Federal Courts for guidance or control.

No one would contend that a new corporation acquiring the assets of a bankrupt under 77B and issuing stock to its creditors was thereafter forever to be under the surveillance of the Federal Courts or to be a nuisance to them.

A trust such as the one here involved is no different. The rights, duties, and obligations created by the trust agreement are those recognized and enforced by general law and equity. There is no right in a beneficiary of that trust to insist that this Court review his case, when he is defeated in the State Court, merely because the trust agreement grew out of a 77B reorganization.

As we will demonstrate, the Supreme Court of Illinois was right, but, even if it were wrong, there is no federal question involved requiring this Court to review and correct any error.

This is not a case of the improper acquisition of interests in a bankrupt, during reorganization, by those in charge of the bankrupt seeking to gain a preferred position. Here the bankrupt had been reorganized, its debts had been wiped out, and all of the beneficial units were on a parity, whether they were in the hands of the persons to whom originally issued or in the hands of any transferee. Neither is this a case of a receiver or trustee in bankruptcy acquiring for himself, and seeking to enforce, obligations of the bankrupt. Such cases are the ones cited and relied on by Petitioners.

No Federal Question Was Ever Raised by Petitioners in the Illinois Courts.

No contention was made by the petitioners, either in the Superior, Appellate, or Supreme Court of Illinois, that there was any federal law, either statutory or by decision, which was controlling. The petitioners did cite some de-

cisions from the Federal Courts which they claimed were in point, but their contention was that the Illinois Court should be persuaded by the reasoning of those cases and not that they were in fact controlling. The respondents did the same.

Merely to cite a federal case on a general equitable proposition and contend that it is in point and persuasive does not raise a federal question. The Supreme Court of Illinois was never apprised of any contention by petitioners that the Court was not free to decide the merits of the case upon general equitable principles without being restricted to decisions rendered by this Court.

The Illinois Supreme Court examined the state and federal cases cited by petitioners and the respondents and found that the petitioners' cases were not in point with the facts in this case. In fact the first case cited by the Illinois Supreme Court in support of its opinion is a decision of this Court but it was not cited by Petitioners.

Since there is no federal question of any kind in the case, it is difficult to argue that one was not raised in the Illinois Courts, but the fact remains that not even the tenuous contentions contained in the petition herein were raised or presented to the Illinois Courts.

STATEMENT OF THE CASE.

The petition misstates the facts, the issues, and the State Court decision. The same misrepresentations of fact were made to the Illinois Supreme Court. We filed a supplemental abstract in that court (Tr. 76) showing the trial court proceedings in full to demonstrate the falsity of the charges made against the Trust Managers. The charges made questioned the good faith and integrity of the Trust Managers, and necessarily the Court examined the record with great care, particularly in the light of the Appellate Court opinion, which it was reversing. The statement of facts made by the Supreme Court of Illinois in its opinion is full, fair, and accurate (Tr. 124), 405 Ill. 264, 90 N. E. (2d) 751. For more ready reference we print that opinion as an appendix to this brief.

The question emphasized by the petitioners in their petition for rehearing in the State Court and in their petition for certiorari that the offer of $850,000 for this property should be submitted without any recommendation against its acceptance became moot long ago. That offer was made in 1946 and was only good for thirty days. Petitioners by their suit precluded any possibility of the presentation of that offer, or any better one received later, to the certificate holders either with or without a recommendation by the Trust Managers.

The real issues were, first, whether or not the Trust Managers, regardless of any question of good faith, were *absolutely precluded* from purchasing on the open market certificates of beneficial interest from certificate holders who desired to sell the same, and, second, whether, in so purchasing the Trust Managers succeeded to all the rights of the certificate holders from whom they bought. We say, "regardless of any question of good

faith," because both the Superior Court of Cook County, Illinois, and the Supreme Court of Illinois found that there was no evidence of bad faith on the part of the Trust Managers, leaving only the pure questions of law in the case. After examining the record and the decisions cited to it, both State and Federal, by both sides, the Supreme Court of Illinois said (Tr. 129):

> "The defendants were selected by the Federal court for the purpose of exercising their judgment and best opinion in the matter of the sale of this property. The trust instrument, binding on all, provides the sale shall be at the sole discretion of the trust managers. To date an adequate price, in their opinion, has not been offered nor has the value of the property recovered to an extent which would warrant a submission of the matter of sale to a vote. In this their opinion may be quite correct. We hold they were not bound to submit any bid under this showing and the court cannot compel the trustees to exercise a discretion given to them by the express terms of the agreement.
>
> "Hillebrecht and Wade had no choice or control over the offering of the shares sold. The selling securities owners, in the exercise of their judgment, wished to dispose of their units, made as easily saleable and assignable as stock certificates by the terms of the trust agreement under which their interests arose. The assignors had received statements, and annual dividends, and had the opportunity, open to all, to visualize and inspect the property itself. Any number of reasons may have motivated their placing their shares for sale in the hands of Greenebaum Investment Company, which company maintained an active market for the 14,439 units issued. The defendants could in no way control the offers of those certificates of beneficial interest on the open market. They paid the prevailing market price or more. The record shows they at no time solicited purchases. On the facts shown here we cannot say they had no right to buy and that, as against plaintiffs, defendants

committed a breach of trust. In view of this conclusion no question of the removal of the trust managers arises."

The facts as stated by the Supreme Court of Illinois (in the light of petitioners' attack) need enlargement in only a few respects.

It is repeatedly stated by petitioners that the Trust Managers would not want to sell the property "at any price," and petitioners cite their own abstract at page 68 which appears to support their statement. This is a piece of incorrect abstracting which has been called to the attention of petitioners' counsel in the Appellate Court of Illinois and in the Supreme Court of Illinois, and it is still repeated and relied upon in this Court.

The statement purports to be an abstract of a colloquy between the trial judge and the only witness, Trust Manager Hillebrecht, in which the judge asked the witness the following question (Tr. 104):

> "If there was a price of, say, $850,000 submitted without any condition, just to find out how they felt, the Trust Managers don't even want to submit any price, I mean at this time—*I won't say 'any price,' but that price?*"

The witness answered:

> "That is correct."

The italicized portion of the question, which is vital, is completely ignored.

It is repeatedly stated by petitioners that the question in this case is whether the Trust Managers could "secretly" acquire through "their broker" certificates at an unfair price. No seller testified as to what he did or did not know. There was not one word of evidence in the trial court as to secrecy in any purchase, nor as to any other circumstance concerning any purchase, and the Supreme Court of Illinois found as a fact that the certificate hold-

ers placed their shares for sale in the hands of Greenebaum Investment Company, which maintained an active market for the units. That court found further that the Trust Managers at no time solicited purchases but that in each instance Greenebaum Investment Company solicited the Trust Managers.

As to the fairness of the prices paid, the Supreme Court of Illinois finds as a fact that the prices paid were the going market prices. It is improper to compare the offer of $850,000 with the purchases made at $19.00 per unit. That price was paid for units in 1938 and 1939 (Tr. 61), when there was absolutely no market for the property at all. The first offer of any kind for the property was $450,000, and that was made in 1943, four or five years after the purchases. Later in 1943 an offer of $550,000 was received and duplicated in 1944. In 1945 an offer of $750,000 was received, and in February, 1946, the offer of $850,000 here in question was received. The market price of certificates rose in proportion to the increase in marketability of the property (Tr. 61-64).

Petitioners' entire vituperative attack upon the Trust Managers is not only unwarranted by the record in this case, but it is directly contrary to the facts as found by the state court.

It is likewise repeatedly stated in the petition that the Supreme Court of Illinois holds in this case that "no matter how *arbitrarily* the Trust Managers should act, a court of equity would be *powerless* to compel them to submit the question of the sale to the beneficiaries." The Illinois Court would be the last to hold such a proposition, and it holds no such thing in this case. The opinion to which petitioners object merely holds that, *in the absence of any showing* that the Trust Managers were acting arbitrarily or improperly, the Court would not interfere with them, and this is good law in any court.

BRIEF AND DISCUSSION.

I.

There is No Federal Question Involved in This Case.

"The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court."

Waters-Pierce Oil Co. v. *Texas,* 212 U. S. 86, op. 97.

"It is essential to the jurisdiction of this court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Citing numerous decisions of the United States Supreme Court.) Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. (Citing numerous authorities.)"

Lynch v. *New York ex rel. Pierson,* 293 U. S. 52, 79 L. Ed. 191.

"The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights."

Milk Wagon Drivers Union of Chicago, Local 753 v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287.

"This court has repeatedly held that in cases coming to it from the Supreme Court of a state it accepts as binding the findings upon issues of fact duly made in that court. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 107; *Rankin* v. *Emigh*, 218 U. S. 27, 34; *Kerfoot* v. *Farmers & Merchants' Bank*, 218 U. S. 281, 288."

Miedreich v. *Lauenstein*, 232 U. S. 236, 243.

"We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in *Dower* v. *Richards*, and in the subsequent cases above referred to."

Egan v. *Hart*, 165 U. S. 188.

II.

The Trust Managers Violated No Rule of Law or Equity In Purchasing Certificates of Beneficial Interest.

A.

The Trust Agreement provides that

"Trust Managers may, but need not, be holders of participation certificates; the rights of any holder of participation certificates to deal freely with Liquidation Trustee and Trust Managers shall not be affected by his being a Trust Manager."

Transcript of Record, p. 31.

B.

The Trustee is always free to buy from his beneficiary provided he deals fairly.

Scott on Trusts, Vol. 2, Sec. 170.21, pp. 900, 901.
39 Cyc.—Trusts, pp. 371-372.
10 Cyc.—p. 796.
Whitesides v. *Taylor,* 105 Ill. 496.
Jackson v. *Pillsbury,* 380 Ill. 554, 44 N. E. (2) 537.
Masterson v. *Wall,* 365 Ill. 102, 6 N. E. (2) 161.
Uhlich v. *Muhlke,* 61 Ill. 499.
Farnam v. *Brooks,* 26 Mass. (9 Pick) 212.
Herpolsheimer v. *Michigan Trust Co.,* 261 Mich. 209, 246 N. W. 81.
Marcum v. *Wallace,* 246 Ky. 726, 56 S. W. (2d) 5.
Flowers v. *Flowers,* 84 Ark. 557, 106 S. W. 949.
Byrne v. *Jones* (C. C. A. 8th, 1908), 159 Fed. 321.
Malden Trust Co. v. *Brooks,* 291 Mass. 273, 197 N. E. 100.
American Bank and Trust Co. v. *Lebanon Bank & Trust Co.,* 28 Tenn. App. 618, 192 S. W. (2) 249.
Brown v. *Cooper,* 62 Tenn. 153.

C.

Since the Trustee of a trust with a few named beneficiaries may buy his beneficiary's interest, then certainly the Trustee of a Liquidation Trust with 14,439 units of beneficial interest outstanding among 700 different holders, is free to buy certificates of beneficial interest.

Hooker v. *Midland Steel Co.,* 215 Ill. 444, 77 N. E. 445.
Donnelly v. *Consolidated Inv. Trust,* 99 Fed. (2d) 185.
Bawden v. *Taylor,* 254 Ill. 464, 98 N. E. 941.
Anchor Realty & Investment Co. v. *Rafferty,* 308 Ill. App. 484, 32 N. E. (2) 394.

D.

If there be any impropriety or basis of complaint in any purchase of a certificate of beneficial interest by a Trustee, the seller is the only one who can complain.

Donnelly v. *Consolidated Inv. Trust,* 99 Fed. (2d) 185.

Seeberger v. *Weinberg,* 151 Ill. 369, 37 N. E. 1033.

Beesley v. *Hamilton,* 50 Ill. 88.

Mairs v. *Madden,* 307 Mass. 378, 30 N. E. (2d) 242.

In Scott on Trusts, Section 170.21, the author states:

> "Where a trustee purchases the interest of one of several beneficiaries, and the sale is made by the beneficiary with full knowledge and for an adequate price and is in all other respects proper, the beneficiary cannot set it aside, nor do the other beneficiaries acquire any interest in the share so purchased."

In *Jackson* v. *Pillsbury,* 380 Ill. 554, 44 N. E. (2d) 537, it is said at page 571 of the Illinois Report:

> "On the other hand, it is equally well established that the mere existence of a fiduciary relation does not invalidate a transaction between the parties where the evidence discloses (1) that the grantor had competent and independent advice of an attorney, or (2) the deed was not procured through improper means attended with circumstances of oppression or overreaching. (Citing cases.) This rule applies even though the relation of conservator, guardian or administrator exists between the grantor and the trustee." (Citing cases.)

In the case of

Donnelly v. *Consolidated Investment Trust,* 99 Fed. (2d) 185,

there were involved large sums of money and very important people. There, two of the trustees purchased beneficial certificates sufficient to give them control and sufficient to permit them to put through a reorganization plan of their own as against opposition. Donnelly, a beneficiary, sued to prevent the trustees from benefiting and profiting from their purchases. The court said, at page 187 of the opinion:

> "A trustee may not legally take or hold any interest or position in conflict with the trusts which he has undertaken nor may he make a personal profit out of transactions made on account of the trust. * * * This principle, on which the appellant relies, has no application in the present case. The trust was not a party to the contracts by which Dumaine and Winsor acquired their stock; nor was it affected by these transactions except that one shareholder was substituted for another. The only persons affected by such contracts were the parties to them. *Dumain's and Winsor's purchases of Amoskeag shares did not in the least affect Donnelly's interest as a shareholder; the number of shares was not altered nor the amount payable on each share, and it did not matter to him who the other owners of shares were.* The purchases were not as he contends utterly illegal and void; no authority is cited in support of this position, and we are aware of none. The disability of a trustee is against profiting personally at the expense of his trust; and this disability will be rigidly enforced. Nothing of that sort occurred here as to Donnelly. Whether there was improper profiting on the part of Dumaine and Winsor at the expense of the shareholders who sold to them is a distinctly different question, not presented by this appeal, on which the complete facts are not before us, and on which we express no opinion." (Emphasis supplied.)

Conclusion.

We respectfully contend:

(1) Petitioners cannot show that they are entitled to invoke the jurisdiction of this Court under Section 1257 of the Judiciary Act of 1948 or otherwise;

(2) Petitioners' real effort is to persuade this Court to re-examine the facts as found by the Supreme Court of Illinois;

(3) This case is governed by general equitable principles as to which there is no conflict between Federal law and the law in Illinois; and

(4) The propositions advanced and the complaints made by the petitioners are without merit.

Respectfully submitted,

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APPENDIX.

Docket No. 31122—Agenda 21—November, 1949.

Harry Y. Victor *et al.*, Appellees, v. Herbert Hillebrecht *et al.*, Appellants.

Mr. JUSTICE CRAMPTON delivered the opinion of the court:

Plaintiffs, appelles here, filed a complaint in equity in the superior court of Cook County for the liquidation of a trust, accounting and other relief. The chancellor dismissed the suit for want of equity. Upon appeal to the Appellate Court, First District, the decree of the trial court was reversed and the cause remanded with directions that a decree be entered in accordance with the views expressed therein, and directing the removal of the trustees. The case comes to this court on leave to appeal.

The property forming the subject matter of the trust is a sixteen-story apartment-hotel building, containing 148 furnished apartments and 31 unfurnished apartments and is located at, and is known as, the 7000 South Shore Drive Building. On November 6, 1935, a liquidation trust agreement was executed pursuant to a plan of reorganization instituted under section 77B of the Bankruptcy Act, wherein the defendants Herbert Hillebrecht, James V. Bremner and Walter A. Wade were appointed Trust Managers, and the Trust Company of Chicago was made the liquidation trustee. The plaintiffs are owners and holders of beneficial trust certificates and instituted the suit as a representative proceeding against the trust managers, the liquidation trustee and Herbert Hillebrecht, individually, as defendants.

The complaint, filed February 27, 1946, alleges the pur-

pose of the plan was to liquidate the property and convert the same into cash for the benefit of holders of the participation certificates, the trust agreement providing for the sale of the property, upon notice to the then holders of the units, no such sale to be made by the liquidation trustee if, within 20 days after such notice, 33⅓ per cent or more of the certificate holders filed written dissents from such sale, with no duty to exercise such power of sale unless directed to do so by the trust managers; determination of the trust was to occur upon such sale in the sole discretion of the trust managers, but in all events, the trust shall terminate on July 1, 1950; that defendant Hillebrecht acquired, by purchase, trust units in excess of 33⅓ per cent thereof at various prices below their actual value under arrangements with various brokerage houses and defendants failed to disclose pertinent information to the certificate holders; several offers had been communicated to the trustees but were never submitted to the unit holders, claiming Hillebrecht was in a position to and did block any sale; a fair appraised price of $850,000 was offered and that the trust managers advised the liquidation trustee to submit this last proposal with the recommendation not to sell, which they assert the defendant trust managers had no right to do. The complaint further charges a violation of their trust by placing themselves in an adverse position to the interests of the beneficiaries; prays that the trust managers be held to hold the units purchased in trust for plaintiffs and other unit holders; that a breach of trust be found; that the property be sold under court control and supervision; for an accounting; and for the removal of the trustees.

The defendants answered admitting certain plaintiffs were original investors; that defendant Hillebrecht owns only circa 1450 units of the total issued of 14,439 and that he received 35 units in the original reorganization in ex-

change for his bonds, remainder having been purchased through Greenebaum Investment Company, which at all times maintained an active market in the certificates, and paid prices ranging from $19 per unit to $51.50 per unit; denied the trust managers ever made available to anyone the lists of unit holders and that they mailed to the certificate holders annual statements of cash receipts and disbursements prepared by a certified public accountant which disclosed the information reasonably necessary for the certificate holders to form their own opinions of the real value of their securities. The answer further admits the receipt of various offers but asserts they were not sufficient to be in the best interest of the security holders and no fair price has yet been offered, and deny failure to sell has been due to any adverse interest; defendants further allege the offer of $850,000 received was a conditional one to be accepted in 30 days with the right to receive higher bids and they believed it their duty to so advise the persons interested and that their intended communication was for the benefit of all unit holders.

The trial was of short duration and the only witness called was the defendant Hillebrecht, who testified for the plaintiff as an adverse witness under section 60 of the Civil Practice Act. (Ill. Rev. Stat. 1949, chap. 110, par. 184.) The balance of the testimony was admitted by stipulation of the parties, including the purchases made by the defendants Hillebrecht and Wade together with the various members of their families, all of which purchases, totalling less than 13 per cent of the outstanding total, were made through Greenebaum Investment Company, which company had sold the original bond issue on the property which was in the sum of $1,350,000. Insurance was placed upon the building based on a value of $1,550,000.

Hillebrecht testified he was the resident manager of the building and devoted practically all of his time thereto.

thereby effecting a saving to the trust of $6000 to $6700 per year; that he received as compensation for his duties as trust manager the sum of $333.33 per year and a small apartment renting for $65 per month; annual reports were sent to shareholders and several dividends were paid; that it was his honest conviction that an offer for a high enough price had not yet been received and therefore no proposition had as yet been submitted; that the property and furnishings are in excellent condition and that he had spent $2300 out of his own funds to protect the building on the purchase of linens; that before this suit was started, the trust managers had decided to submit the $850,000 offer without recommendation; that nevertheless the trust managers wrote a letter to the liquidation trustee, introduced as exhibit "B" and dated February 15, 1946, twelve days before the complaint herein was filed, in which they stated they had concluded to advise the owners of the certificates against the sale at that figure, and Hillebrecht stated if it had come to a vote he would have voted against it; that he had 35 units originally in exchange for his bonds and purchased the various additional units at different times always upon the solicitation of Greenebaum and in order to do so he had switched certain of his securities, for which he had paid 100 cents on the dollar; that his object in buying was to protect the trust from pressure groups on the outside who were trying to force a sale at a low price; and that he or the trustees never at any time furnished lists of certificate holders to Greenebaum, or to anyone else.

The trust agreement provided for the appointment of the trust managers and contained this provision, "Trust Managers, may, but need not, be holders of participation certificates. The rights of any holder of participation certificates to deal freely with Liquidation Trustee and Trust Managers shall not be affected by his being a Trust Manager."

Appendix.

Counsel admit there is no case in Illinois or elsewhere directly dealing with a purchase as shown by the precise facts here presented and we are called upon to decide the case upon analogous reasoning and the application of general principles governing the law of trusts and trustees and their duties to their beneficiaries.

The broad general rule that a trustee may not purchase from himself and at his own sale is universally recognized and is a stern, unbending rule which we have no desire to deprecate. That rule is conceded by the appellants here. But there are certain exceptions to the rule which are as well established as the rule itself. One is that a trustee may purchase trust property for his own benefit where the trustee could not have any control over the sale. *Allen* v. *Gillette*, 127 U. S. 589; 54 Am. Jur. "Trusts," par. 458, p. 365.

Nor is there any rule of law or equity which prevents a beneficiary of a trust, who is under no incapacity, from disposing of his interest in the trust estate for a consideration (65 C. J. 546, "Trusts," sec. 303; id. 774, sec. 645) and a beneficiary may sell his interest in the trust to the trustee. (*Masterson* v. *Wall*, 365 Ill. 102; Bogert on Trusts and Trustees, Vol. I, sec. 188.) Even a sole trustee can likewise be one of several beneficiaries of a trust and a person has capacity to receive a transfer of the beneficial interest under a trust to the extent that he has the capacity to be beneficiary of the trust. Restatement of the Law of Trusts, 339, sec. 133.

It is not feasible within reasonable limits to discuss all of the cases cited by counsel. Many volumes and a large number of decisions have been written upon this subject. The inflexibility of the rule of disability of a trustee to purchase assets of his trust is well founded and the reasons therefor are many. Yet, there are likewise many cases, in special circumstances, where the reasons for the rule disappear and when this situation obtains it does not apply.

Appendix.

Most of the cases reviewed and which strictly apply the rule are cases where the trustee purchases an encumbrance upon or claim against the trust property. This, however, is not synonymous with the interest of a beneficiary. Others are cases where the beneficiaries were under disability or they are cases which place the trustee in a position of holding an interest adverse to the beneficiary. The interest of a beneficiary is not an encumbrance on the trust estate, nor a claim which is adverse to the trust. A trustee is under no duty to purchase the interest of one beneficiary for the advantage of another beneficiary. Such a course of action and conduct on the part of a trustee would in itself constitute a breach of trust. All beneficiaries of a trust are entitled to receive their full share or interest in the trust estate and the assignee of that interest, whether the trustee or some other party, takes the interest in the trust estate which the assignor had, in the absence of fraud. *American Bank and Trust Co.* v. *Lebanon Bank & Trust Co.*, 28 Tenn. App. 618, 192 S. W. 2d 245 (*certiorari* denied.)

In *Froneberger* v. *Lewis*, 79 N. C. 426, 77 A. L. R. 1511, the court said: "There are a class of cases which have to be distinguished from the general rule as follows: wherever the trustee has a personal interest in the trust property, there of course he must have the right to protect it, and if to bid for and buy it be necessary to protect it, he must be allowed to do it for that purpose."

In *Brown* v. *Cooper*, 62 Tenn. 153, the trustee purchased the interests of certain beneficiaries of the trust at a discount. Other subordinate beneficiaries sought to recover the profit thus made by the trustee on the ground that such profit inured to their benefit. The court rejected that contention and held the assigning beneficiaries had a right to transfer their interests to the trustee, that he was entitled to receive the full pro rata shares which would have gone to his assignors and that the remaining beneficiaries

could not object. In conclusion, the court said: "This is not the case * * * of a trustee purchasing claims against the trust estate at a discount in which the purchase would inure to the benefit of those owning the trust estate; but it is a purchase by the trustee of the trust property or estate itself and being fairly done, the trustee succeeds to the interest of his vendors."

It is highly significant in the case at bar, that the plaintiffs suing are not the beneficiaries who have sold their units upon the open market. All of the plaintiffs here are present certificate holders and, as far as the record discloses, none have parted with any of their interests. No one has come forward here who has sold his or her certificates. On the other hand, bids have increased from $500,000 or thereabouts to $850,000, and the plaintiffs, so far at least, have been benefited by the action of the trust managers in refusing to submit or recommend a sale of the very valuable trust *res* forming the subject matter of this trust, property originally bonded in the sum of $1,300,000 and insured for a million and a half. True, the purchasing defendants, if the property is eventually sold for more than that bid, will stand to profit handsomely by the sale. However questionable the practice of bidding in these certificates on the market by the trustee may be, we think these plaintiffs are in no position to complain because they have not been hurt and any gain accruing to the defendants Hillebrecht and Wade will likewise proportionately accrue to plaintiffs. The transactions at best are merely voidable, not void. 26 R. C. L. 1375, par. 236.

In *American Bank and Trust Co.* v. *Lebanon Bank & Trust Co.*, 28 Tenn. App. 618; 192 S. W. 2d 245 (*certiorari* denied), the court said: "The interest of a beneficiary and the interest of the trust are the same. If the interest of the trust is promoted, the beneficiary is benefited thereby to the extent of his interest in the trust. A transfer of a

beneficial interest to the trustee has the effect of transferring to the trustee that part of the trust which the beneficiary had. Neither complainant nor other beneficiaries had any interest in the transaction under the facts of this case. * * * The assignor does not complain. Complainant cannot do so for want of interest." We think this reasoning applies in this case.

The complaint in the case at bar is predicated upon the theory that defendants purchased a sufficient number of units to block any sale, 33⅓ per cent thereof being sufficient for this purpose, but the proof shows the defendants Hillebrecht and Wade together owned only about 11 per cent thereof and, with all the members of their families, owned less than 13 per cent. Aside, therefore, from any variance or stipulation not to take advantage of any variance, the proof falls far short of establishing control over any offer of sale. This failure of proof carries with it the principal basis of the complaint.

The defendants were selected by the Federal court for the purpose of exercising their judgment and best opinion in the matter of the sale of this property. The trust instrument, binding on all, provides the sale shall be at the sole discretion of the trust managers. To date an adequate price, in their opinion, has not been offered nor has the value of the property recovered to an extent which would warrant a submission of the matter of sale to a vote. In this their opinion may be quite correct. We hold they were not bound to submit any bid under this showing and the court cannot compel the trustees to exercise a discretion given to them by the express terms of the agreement.

Hillebrecht and Wade had no choice or control over the offering of the shares sold. The selling securities owners, in the exercise of their judgment, wished to dispose of their units, made as easily saleable and assignable as stock certificates by the terms of the trust agreement under which

their interests arose. The assignors had received statements, and annual dividends, and had the opportunity, open to all, to visualize and inspect the property itself. Any number of reasons may have motivated their placing their shares for sale in the hands of Greenebaum Investment Company, which company maintained an active market for the 14,439 units issued. The defendants could in no way control the offers of those certificates of beneficial interest on the open market. They paid the prevailing market price or more. The record shows they at no time solicited purchases. On the facts shown here we cannot say they had no right to buy and that, as against plaintiffs, defendants committed a breach of trust. In view of this conclusion no question of the removal of the trust managers arises.

For the reasons assigned, the judgment of the Appellate Court is reversed and the decree of the trial court dismissing the suit for want of equity is affirmed.

Appellate Court reversed; superior court affirmed.

Appendix.